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SABAH DEVELOPMENT BANK BHD v. PETRON OIL (M) SDN BHD

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
AHMAD MAAROP PCA
B AZAHAR MOHAMED CJ (MALAYA)
NALLINI PATHMANATHAN FCJ
RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: 02(f)-27-04-2018(S)]
17 FEBRUARY 2020

C

CONTRACT: *Agreement – Sale of goods – Claim for recovery of debt by creditor – Absolute assignment of contract proceeds to bank as security for credit facilities – Effect of absolute assignment – Whether entitlement to recover proceeds transferred to bank – Whether creditor's claim premised on trust and/or constructive trust* D *prevailed over bank's absolute assignment – Whether bank held monies in constructive trust for creditor – Whether freezing of first account and creation of subsequent account affected validity of absolute assignment – Civil Law Act 1956, s. 4(3)*

CONTRACT: *Assignment – Absolute assignment – Claim for recovery of debt by* E *creditor – Absolute assignment of contract proceeds to bank as security for credit facilities – Effect of absolute assignment – Whether entitlement to recover proceeds transferred to bank – Whether creditor's claim premised on trust and/or constructive trust prevailed over bank's absolute assignment – Whether bank held monies in constructive trust for creditor – Whether freezing of first account and creation of* F *subsequent account affected validity of absolute assignment – Civil Law Act 1956, s. 4(3)*

TRUSTS: *Constructive trust – Existence of trust – Claim for recovery of debt by creditor – Absolute assignment of contract proceeds to bank as security for credit facilities – Whether creditor's claim premised on trust and/or constructive trust* G *prevailed over bank's absolute assignment – Whether bank held monies in constructive trust for creditor*

On 19 December 2012, Sabah Electricity Board ('SESB') awarded Swakaya Sdn Bhd ('Swakaya') a contract to supply and deliver diesel fuel to SESB's power stations ('the SESB contract') for the contract sum of H RM506,952,888.75. In order to finance and carry out the SESB contract, Swakaya obtained two banking facilities from the Sabah Development Bank Bhd ('bank') totalling RM85 million. As security for the initial RM50 million banking facility, Swakaya executed an assignment of contract proceeds agreement dated 3 April 2013, by which Swakaya assigned I absolutely to the bank all the contract proceeds from the SESB contract. By a written notice of assignment to SESB on 20 March 2013, Swakaya irrevocably instructed SESB to remit all contract proceeds arising from the SESB contract to a project account with Malayan Banking Berhad, Kota

Kinabalu ('first project account'). SESB acknowledged receipt of the notice of assignment and agreed to it. Security for the repayment of the additional RM35 million afforded to Swakaya, came in the form of a supplemental assignment of contract proceeds agreement dated 23 August 2013 in favour of the bank. This amounted to a second absolute assignment of all contract proceeds to the bank. As security, Swakaya absolutely assigned the full contract sum of the SESB contract, RM506,952,888.75, to the bank. Swakaya agreed that the bank could use the proceeds deposited into the first project account towards payment of the outstanding credit facilities. One of the terms of the contract for the supply of diesel oil between Swakaya and SESB was that Swakaya could not assign the contract or the contract benefits to any other party without the prior written consent of SESB. This clause was expressed to not affect any right of Swakaya to assign absolutely, or by way of charge any money due or to become due to it, or which may be payable to Swakaya under the contract. This enabled Swakaya to absolutely assign payments received, to the bank to repay the facilities it had procured. On 1 April 2013, Swakaya entered into a contract with its suppliers, one of which was Petron, wherein, Petron would provide diesel fuel for a period of two years for Swakaya to enable it to fulfil its contract with SESB. Petron was to be paid out of the first project account.

In October 2013, the first project account was frozen by the Malaysian Anti-Corruption Commission ('MACC') under the Anti-Money Laundering Act 2001 ('AMLA'). Swakaya was denied access to the funds in the said account and was accordingly unable to use the funds in that account to purchase diesel fuel to fulfil its legal obligations under the SESB contract. To address the problem, Swakaya requested Petron to supply diesel fuel to SESB directly. In return, Swakaya agreed that SESB could pay Petron directly and informed SESB of the new arrangement. The new arrangement was confirmed in a letter dated 15 November 2013, signed by Swakaya and Petron, but not by SESB. This 'new arrangement' was organised by Swakaya notwithstanding its express knowledge and execution of the absolute assignments it had effected in favour of the bank. As the bank was also unable to withdraw monies owed to it from the first project account, Swakaya agreed to open a second project account, this time, with CIMB Bank Bhd ('second project account'). The second project account was opened in November 2013. It was requested that all contract proceeds from the SESB contract be remitted to the second project account. The bank *vide* letter dated 20 November 2013 informed SESB of the second project account at CIMB bank. The bank requested that all contract proceeds from the SESB contract be remitted to the second project account. On 18 February 2014, Petron wrote to SESB and copied the letter to the bank, seeking that Swakaya and the bank remit monies to Petron for diesel oil supplied. By a second notice issued by Swakaya to SESB, Swakaya notified SESB of the assignment of all contract proceeds in favour of the bank, and irrevocably instructed SESB to remit all contract proceeds from the SESB contract to the second project account. This was acknowledged by SESB on 28 February 2014. During the period

between the freezing of the first project account and prior to the setting up of the second project account, monies were paid out to Petron directly instead of the bank. The value of the diesel fuel supplied under the 'new arrangement' between Swakaya and Petron amounted to RM50,094,713.79. Petron was paid a portion of that sum, namely RM26,027,121.95 directly. After receiving the letter dated 20 November 2013, no direct payment was made to Petron from the second project account. Instead, SESB followed the bank's instructions in the letter dated 20 November 2013 and deposited payment into the second project account.

In the High Court, Petron brought a claim against Swakaya for the outstanding sum of RM24,835,281.62 due and owing to it for the supply of diesel oil at Swakaya's behest to SESB. Its claim against the bank was premised on the basis that the bank held the monies paid by SESB in its favour as 'trustee' or 'constructive trustee' and was liable to Petron for the same. The High Court held that Petron was entitled to the proceeds, premised on the grounds that a constructive trust could be inferred over the subject monies/proceeds deposited by the SESB into Swakaya's bank account, as payment to Petron for goods sold and delivered. The Court of Appeal affirmed the decision of the High Court and dismissed the bank's appeal with costs. The crux of the Court of Appeal's decision was that the sum of RM24,835,281.62 was meant as payment for Petron's sale of diesel fuel to SESB. It was never meant as repayment of Swakaya's loan taken from the bank. There was no evidence that Petron consented to the money being utilised to reduce Swakaya's loan. Hence, the court held that the bank could not unjustly enrich itself by utilising the monies for its own benefit. The bank obtained leave to appeal on the question of law as to 'whether the proprietary rights and interest of an assignee of a chose in action under a legal and absolute assignment could be defeated by a claim premised on 'trust' and/or 'constructive trust' by a third party who claimed to have a beneficial interest over the same chose in action.

Held (allowing appeal; answering leave question in negative)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) Swakaya provided security for the credit facilities of RM85 million it procured from the bank in the form of the assignment of all proceeds received by Swakaya from the SESB contract. A similar provision was found in the supplemental assignment of contract proceeds dated 23 August 2013. Therefore, the absolute assignments created were legally valid as the requisite written notices of assignment were served on SESB as provided under s. 4(3) of the Civil Law Act 1956 ('CLA'). (paras 55-57)

(2) 'Chose in action' is defined as 'a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action'. Therefore, the monies which Swakaya was entitled to receive from SESB under the SESB contract for the supply of diesel oil

amounts to a 'chose in action'. The bank, as assignee, had no present right of enjoyment, but by reason of the assignment was entitled to a right to recover those monies by action. (para 64)

(3) The bank held an absolute assignment, consistent with the use of the words 'assigns absolutely' as employed in section 3.1 of the contract for the assignment of proceeds. Hence, the assignment of the chose in action, *ie*, the right to the proceeds paid into the project accounts, was an absolute assignment and not by way of charge only. The legal entitlement to the contract proceeds, as and when they are deposited in the project accounts was that of the bank and not Swakaya or any other third party. The effect and consequence of the absolute assignment was therefore that ownership or entitlement to recover and receive the proceeds paid in by SESB was transferred from Swakaya to the bank as early as 3 April 2013. (paras 68-70)

(4) The conditions necessary for effecting an absolute legal assignment under s. 4(3) of the CLA as set out in the case of *UMW Industries Sdn Bhd v. Ah Fook* are: (i) the 'debt or other chose in action' must be one that is existing; (ii) the assignment must be in writing under the hand of the assignor; (iii) the assignment must be absolute and not by way of charge only; and (iv) there must be express written notice of the assignment to the obligor. The conditions were met in the instant case. (paras 72 & 73)

(5) The assignment by Swakaya dated 3 April 2013 and 23 August 2013 was absolute as Swakaya, as assignor, intended to transfer its legal rights and beneficial interest over the SESB contract proceeds irrevocably to the bank, as assignee. The assignment was unconditional and did not introduce uncertainty to the obligor, as SESB had been given express notice to make payment to the bank and SESB had expressly consented to the assignment in writing. The effect of the consent was to transfer ownership of all future funds deposited in the designated accounts to the bank. (paras 76-80)

(6) The bank's right to the contract proceeds remained intact notwithstanding the freezing of the first project account and the opening of the second project account. Since Swakaya had lost its rights and interest to the contract proceeds, it could not resile from the absolute assignment by entering into a new agreement with Petron. This was contrary to and contravened the terms of the assignment of contract proceeds agreement it had executed with the bank. More importantly it did not have the effect of diverting funds to Petron because Swakaya had no legal entitlement to those contract proceeds. Swakaya also had no right to make any payment to Petron from the second project account without the consent of the bank. As such, there was no basis for the trial judge to effectively 'extinguish' the rights of the bank as the lawful assignee under the absolute assignment and

impose a constructive trust in favour of Petron for the sum of RM24,835,281.62 by virtue of the new agreement between Petron and Swakaya. (paras 84-87)

(7) The imposition of a constructive trust could only arise by operation of law where the circumstances are such that it would be unconscionable for the bank to continue to assert a right to the contract proceeds under the SESB contract so as to deny a subsisting interest of Petron. It was not and could not be unconscionable for the bank to rightfully seek to recover the monies in the second project finance account because entitlement to those monies was transferred to the bank as of 3 April 2013. The issue of 'unconscionability' did not arise in the face of clear legal rights created under established principles which comprise the cornerstone of banking law. (paras 91 & 92)

(8) There was no evidence of dishonest conduct on the part of the bank. Dishonesty or less than honourable conduct could be attributed only to Swakaya. It was Swakaya that entered into a contract with Petron, inducing it to continue to supply diesel oil *vide* the new contract, without disclosing that the contract proceeds in the second project finance had already been absolutely assigned to the bank. The bank was never made aware of this arrangement and neither did SESB concur with any such arrangement, knowing that it would run afoul of the absolute assignment which it had expressly consented to. Therefore, there was no basis for the imposition of a constructive trust. (paras 94 & 95)

(9) Petron's recourse was against Swakaya directly as it entered solely into a contract with Swakaya. Petron did not enter into any arrangement with the bank whereby the bank consented to Petron being paid out of the contract proceeds. As for SESB, even if it had knowledge of the new arrangement between Swakaya and Petron, it had no bearing whatsoever on the absolute assignment, by which SESB was bound to deposit contract proceeds into a project account in favour of the bank. The contract between Swakaya and Petron did not create an equity giving Petron any interest in the contract proceeds as Swakaya had no entitlement or right to create any such interest by reason of the absolute assignment in favour of the bank. The contract between Swakaya and Petron, created, at best, a debt due and owing by Swakaya to Petron when it failed to pay for the diesel supplies. (paras 97 & 98)

(10) It would be completely contrary to the doctrine of constructive trust under the common law, as well as established principles of written law to conclude that the bank held the balance sum as a trustee in favour of Petron. There was also no relationship between the bank and Petron for the bank to hold the monies for Petron in a fiduciary capacity. There was no basis in law to support the proposition that Petron's

mere claim for the recovery of a debt against Swakaya can possibly prevail against that of the bank, where the bank was the lawful assignee in law. The bank's claim, which arose prior to any claim by Petron, prevailed. Petron had no equity in those SESB contract proceeds. (paras 102, 103 & 108)

Bahasa Melayu *Headnotes*

Pada 19 Disember 2012, Sabah Electricity Board ('SESB') mengawardkan kepada Swakaya Sdn Bhd ('Swakaya'), satu kontrak pembekalan dan penghantaran minyak diesel ke stesen kuasa SESB ('kontrak SESB') pada jumlah kontrak RM506,952,888.75. Demi membiayai dan menjalankan kontrak SESB, Swakaya memperoleh dua kemudahan perbankan daripada Sabah Development Bank Bhd ('bank') berjumlah RM85 juta. Sebagai jaminan untuk RM50 juta pertama kemudahan perbankan, Swakaya memeterai satu perjanjian penyerahan hak hasil kontrak bertarikh 3 April 2013, menyerah hak secara mutlak kesemua hasil kontrak daripada kontrak SESB kepada bank. Melalui notis penyerahan hak bertulis kepada SESB pada 20 Mac 2013, Swakaya mengarahkan SESB meremitkan, secara tak boleh batal, kesemua hasil kontrak daripada kontrak SESB ke akaun projek dengan Malayan Banking Bhd, Kota Kinabalu ('projek akaun pertama'). SESB mengaku penerimaan notis penyerahan hak dan bersetuju dengannya. Jaminan untuk pembayaran balik tambahan RM35 juta yang diberi kepada Swakaya, adalah dalam bentuk perjanjian tambahan penyerahan hak hasil kontrak bertarikh 23 April 2013 berpihak pada bank. Ini membentuk penyerahan hak mutlak kesemua hasil kontrak kepada bank. Sebagai jaminan, Swakaya menyerah hak kesemua jumlah kontrak SESB, RM506,952,888.75, kepada bank. Swakaya bersetuju untuk bank menggunakan hasil yang didepositkan dalam akaun projek pertama untuk pembayaran kemudahan kredit tertunggak. Salah satu terma kontrak untuk pembekalan minyak diesel antara Swakaya dan SESB adalah bahawa Swakaya tidak boleh menyerah hak kontrak tersebut atau faedah kontrak kepada mana-mana pihak tanpa persetujuan bertulis SESB. Klausa ini jelas tidak menjejaskan hak Swakaya untuk menyerah hak secara mutlak, atau melalui gadaian apa-apa wang terhutang atau akan menjadi terhutang kepadanya, atau yang perlu dibayar kepada Swakaya bawah kontrak itu. Ini membolehkan Swakaya menyerah hak secara mutlak bayaran yang diterima, kepada bank untuk membayar balik kemudahan yang diperoleh. Pada 1 April 2013, Swakaya memasuki kontrak dengan pembekal-pembekalnya, salah satu daripadanya ialah Petron Oil (M) Sdn Bhd ('Petron'), dan Petron akan membekalkan minyak diesel untuk tempoh dua tahun kepada Swakaya untuk membolehkannya memenuhi kontraknya dengan SESB. Petron akan dibayar daripada akaun projek pertama.

Pada Oktober 2013, akaun projek pertama dibekukan oleh Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') bawah Akta Pencegahan Pengubahan Wang 2001 ('AMLA'). Swakaya dinafikan akses pada dana dalam akaun tersebut dan dengan itu tidak berupaya menggunakan dana-dana dalam akaun

itu untuk membeli minyak diesel untuk memenuhi kewajipan undang-undang bawah kontrak SESB. Untuk menyelesaikan masalah itu, Swakaya meminta Petron membekalkan minyak diesel kepada SESB secara terus. Sebagai balasan, Swakaya bersetuju bahawa SESB boleh membayar terus kepada Petron dan memaklumkan SESB tentang pengaturan baharu tersebut. Pengaturan baharu tersebut disahkan melalui surat bertarikh 15 November 2012, ditandatangani oleh Swakaya dan Petron, tetapi bukan SESB. 'Pengaturan baharu' diatur oleh Swakaya meskipun mempunyai pengetahuan dan pemeteraian penyerahan hak mutlak yang dimasukinya berpihak pada bank. Oleh sebab bank tidak boleh mengeluarkan wang yang terhutang padanya daripada akaun projek pertama, Swakaya bersetuju untuk membuka akaun kedua projek, kali ini, dengan CIMB Bank Bhd ('akaun kedua projek'). Akaun projek kedua dibuka pada November 2013. Kesemua hasil kontrak daripada kontrak SESB diminta dimasukkan ke dalam akaun kedua projek. Bank melalui surat bertarikh 20 November 2013 memaklumkan SESB tentang akaun kedua projek di bank CIMB. Bank memohon kesemua hasil kontrak daripada kontrak SESB diremitkan ke akaun projek kedua. Pada 18 Februari 2014, Petron menulis kepada SESB dan memberi salinan surat kepada bank, memohon Swakaya dan bank meremitkan wang kepada Petron untuk minyak diesel yang dibekalkan. Melalui notis kedua yang dikeluarkan oleh Swakaya kepada SESB, Swakaya memaklumkan SESB tentang penyerahan hak kesemua hasil kontrak berpihak pada bank, dan secara tak batal, mengarahkan SESB meremitkan kesemua hasil kontrak daripada kontrak SESB ke akaun kedua projek. Ini diakui oleh SESB pada 28 Februari 2014. Semasa tempoh pembekuan akaun pertama projek dan sebelum pembentukan akaun kedua projek, wang dibayar terus kepada Petron dan bukan kepada bank. Nilai minyak diesel yang dibekalkan bawah 'pengaturan baharu' antara Swakaya dan Petron bernilai RM50,094,713.79. Petron dibayar sebahagian daripada jumlah itu, iaitu, RM26,027,121.95 secara terus. Selepas menerima surat bertarikh 20 November 2013, tiada bayaran terus dibuat kepada Petron daripada akaun kedua projek. Sebaliknya, SESB menuruti arahan bank dalam surat bertarikh 20 November 2013 dan mendepositkan bayaran ke dalam akaun kedua projek.

Di Mahkamah Tinggi, Petron membawa tuntutan terhadap Swakaya untuk tunggakan RM24,835,281.62 yang masih terhutang untuk pembekalan minyak diesel atas perintah Swakaya kepada SESB. Tuntutannya terhadap bank berasaskan bahawa bank memegang wang yang dibayar oleh SESB bagi pihaknya sebagai 'pemegang amanah' atau 'pemegang amanah konstruktif' dan bertanggungan terhadap Petron untuk itu. Mahkamah Tinggi memutuskan Petron berhak pada hasil tersebut, berdasarkan alasan-alasan bahawa amanah konstruktif boleh dianggap terhadap wang/hasil yang didepositkan oleh SESB ke dalam akaun bank Swakaya, sebagai bayaran kepada Petron untuk barangan yang dijual dan dihantar. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan bank dengan kos. Asas keputusan Mahkamah Rayuan adalah bahawa jumlah RM24,835,281.62 dimaksudkan sebagai bayaran untuk jualan minyak diesel

oleh Petron kepada SESB. Itu tidak bermaksud sebagai pembayaran balik hutang Swakaya dengan bank. Tiada keterangan bahawa Petron menyetujui wang tersebut digunakan untuk mengurangkan hutang Swakaya. Oleh itu, mahkamah memutuskan bahawa bank tidak boleh mengkayakan dirinya secara tidak adil dengan menggunakan wang tersebut untuk faedahnya sendiri. Bank memperoleh kebenaran untuk merayu atas soalan undang-undang 'sama ada hak dan kepentingan proprietari pemegang serah hak satu hak dalam tindakan bawah undang-undang dan penyerahan hak mutlak boleh diatasi oleh tuntutan berdasarkan 'amanah' dan/atau 'amanah konstruktif' oleh pihak ketiga yang menuntut mempunyai kepentingan benefisial atas hak dalam tindakan tersebut.

Diputuskan (membenarkan rayuan; menjawab soalan secara negatif)
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Swakaya memperuntukkan jaminan untuk kemudahan kredit sejumlah RM85 juta yang diperolehinya daripada bank dalam bentuk penyerahan hak kesemua hasil yang diterima Swakaya daripada kontrak SESB. Peruntukan serupa ditemui dalam penyerahan hak tambahan hasil kontrak bertarikh 23 April 2013. Oleh itu, penyerahan hak mutlak dibentuk adalah sah kerana notis penyerahan hak bertulis yang diperlukan telah pun diserahkan kepada SESB seperti yang diperuntukkan bawah s. 4(3) Akta Undang-undang Sivil 1956 ('Akta').

(2) 'Hak dalam tindakan' ditafsirkan sebagai 'sesuatu yang mana satu-satu orang tidak boleh menikmati pada waktu semasa tetapi hanya hak untuk mendapatkannya semula (jika ditahan) melalui tindakan'. Oleh itu wang yang berhak diterima Swakaya daripada SESB bawah kontrak SESB untuk pembekalan minyak diesel membentuk 'hak dalam tindakan'. Bank sebagai pemegang serah hak, tiada hak semasa yang boleh dinikmati, tetapi melalui penyerahan hak, berhak mendapatkan semula wang melalui hak dalam tindakan.

(3) Bank memegang penyerahan hak mutlak, konsisten dengan penggunaan perkataan-perkataan 'assigns absolutely' yang digunakan dalam seksyen 3.1 kontrak penyerahan hak hasil. Oleh itu, penyerahan hak untuk hak dalam tindakan iaitu hak terhadap hasil yang dibayar dalam akaun-akaun projek, adalah penyerahan hak mutlak dan bukan melalui gadaian sahaja. Hak dari segi undang-undang terhadap hasil kontrak, sebaik sahaja dan apabila didepositkan ke dalam akaun-akaun projek adalah milik bank dan bukan Swakaya atau mana-mana pihak ketiga. Kesan dan akibat penyerahan hak mutlak, oleh itu, adalah milikan atau hak mendapatkan kembali dan menerima hasil yang dibayar oleh SESB dipindahkan daripada Swakaya kepada bank seawal 3 April 2013.

(4) Syarat perlu untuk membentuk penyerahan hak mutlak yang sah bawah s. 4(3) Akta seperti yang dinyatakan dalam kes *MW Industries Sdn Bhd v. Ah Fook* adalah (i) 'hutang atau hak lain dalam tindakan' mestilah satu yang masih wujud; (ii) penyerahan hak mesti secara bertulis oleh penyerah hak; (iii) penyerahan hak mestilah mutlak dan bukan secara gadaian sahaja; dan (iv) perlu ada notis bertulis jelas untuk penyerahan hak kepada penanggung obligasi. Syarat-syarat tersebut telah pun dipenuhi dalam kes ini.

(5) Penyerahan hak mutlak oleh Swakaya bertarikh 3 April 2013 dan 23 Ogos 2013 adalah mutlak kerana Swakaya, sebagai penyerah hak, meniatkan untuk memindahkan haknya dari segi undang-undang dan kepentingan benefisial atas hasil kontrak SESB secara tak batal kepada bank, sebagai pemegang serah hak. Penyerahan hak tersebut tidak bersyarat dan tidak memperkenalkan ketidakpastian kepada penanggung obligasi, kerana SESB telah memberi notis jelas untuk membuat bayaran kepada bank dan SESB jelas mempersetujui penyerahan hak tersebut secara bertulis. Kesan persetujuan itu adalah pemindahan milikan kesemua dana pada masa akan datang yang didepositkan dalam akaun-akaun yang dibentuk, kepada bank.

(6) Hak bank untuk hasil kontrak kekal tidak diusik walaupun dengan pembekuan akaun pertama projek dan pembukaan akaun kedua projek. Oleh sebab Swakaya kehilangan hak dan kepentingan terhadap hasil kontrak, Swakaya tidak boleh berbalik daripada penyerahan hak mutlak dengan memasuki perjanjian baharu dengan Petron. Ini bertentangan dan bercanggah dengan terma-terma perjanjian penyerahan hak hasil kontrak yang dimeterainya dengan bank. Lebih penting lagi, Swakaya tidak mempunyai kesan memindahkan dana daripada Petron kerana Swakaya tiada hak sah atas hasil kontrak itu. Swakaya juga tiada hak untuk membuat apa-apa bayaran kepada Petron daripada akaun kedua projek tanpa persetujuan bank. Oleh itu, tiada asas untuk hakim bicara 'melupuskan' hak bank sebagai pemegang serah hak bawah penyerahan hak mutlak dan mengenakan amanah konstruktif berpihak pada Petron untuk jumlah RM24,835,281.62 menurut perjanjian baharu antara Petron dan Swakaya.

(7) Pengenaan amanah konstruktif hanya boleh berbangkit melalui undang-undang iaitu hal keadaan menjadikannya tidak berpatutan untuk bank menuntut hak atas hasil kontrak bawah kontrak SESB yang menafikan kepentingan sedia ada Petron. Ini bukan dan tidak boleh menjadi tidak berpatutan untuk bank memohon dengan sah untuk pengembalian wang dalam akaun kewangan kedua projek kerana hak terhadap wang itu telah dipindahkan kepada bank pada 3 April 2013. Isu 'ketidakpatutan' tidak timbul berikutan hak jelas dari segi undang-undang yang terbentuk bawah prinsip matan yang membentuk asas undang-undang perbankan.

(8) Tiada keterangan tindakan tidak jujur oleh bank. Ketidakjujuran atau kelakuan kurang jujur hanya boleh dikaitkan dengan Swakaya. Swakaya yang memasuki kontrak dengan Petron, mendorong Petron meneruskan pembekalan minyak diesel melalui kontrak baharu, tanpa mendedahkan bahawa hasil kontrak dalam akaun kedua projek telah diserah hak secara mutlak kepada bank. Bank tidak pernah dimaklumkan tentang pengaturan ini dan SESB juga tidak menyetujui pengaturan tersebut, mengetahui bahawa ini bertentangan dengan penyerahan hak mutlak yang jelas dipersetujuinya. Oleh itu, tiada asas untuk pengenaan amanah konstruktif.

(9) Rekursa Petron adalah terus terhadap Swakaya kerana Petron memasuki kontrak dengan Swakaya. Petron tiada apa-apa urusan dengan bank yang menjadikan bank menyetujui Petron dibayar daripada hasil kontrak. Terhadap SESB, pengetahun tentang pengaturan baharu antara Swakaya dan Petron, tidak membawa kesan terhadap penyerahan hak mutlak tersebut, yang melaluinya SESB terikat untuk mendepositkan hasil kontrak ke dalam akaun projek berpihak pada bank. Kontrak antara Swakaya dan Petron tidak membentuk ekuiti yang memberikan Petron apa-apa kepentingan dalam hasil kontrak kerana Swakaya tiada hak untuk membentuk apa-apa kepentingan sedemikian atas alasan penyerahan hak mutlak kepada bank. Kontrak antara Swakaya dan Petron hanya membentuk hutang tertunggak dan perlu dibayar oleh Swakaya kepada Petron apabila gagal membayar untuk bekalan minyak diesel.

(10) Amat bertentangan dengan doktrin amanah konstruktif bawah common law, dan prinsip matan undang-undang bertulis untuk memutuskan bank memegang baki jumlah sebagai pemegang amanah berpihak pada Petron. Tiada hubungan antara bank dan Petron untuk bank menyimpan wang untuk Petron dalam kapasiti fidusiari. Tiada asas dari segi undang-undang yang menyokong cadangan bahawa tuntutan Petron untuk pengembalian hutang semata-mata terhadap Swakaya mengatasi tuntutan bank, apabila bank adalah pemegang serah hak yang sah. Tuntutan bank, yang timbul sebelum apa-apa tuntutan oleh Petron, lebih mengatasi. Petron tiada ekuiti dalam hasil kontrak SESB.

Case(s) referred to:

Affin Bank Bhd v. ACP Industries Bhd [2013] 1 LNS 388 CA ***(refd)***
Carl Zeiss Stiftung v. Herbert Smith & Co [1969] 2 Ch 276 ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Chung Khiaw Bank Ltd v. Hipparion (M) Sdn Bhd [1988] 1 CLJ 164; [1988] 1 CLJ (Rep) 480 HC ***(refd)***
CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***
Damai Freight (M) Sdn Bhd v. Affin Bank Bhd [2015] 4 CLJ 1 FC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Henderson v. Foxworth Investments Ltd and Another [2014] 1 WLR 2600 ***(refd)***

Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC ***(refd)***
Hussey v. Palmer [1972] 3 All ER 744 ***(refd)***
Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd [2016] 2 CLJ 717 FC ***(refd)***
Mercantile Bank of London Ltd v. Evans [1899] 2 QB 613 ***(refd)***
Metzgar ex rel. Uhler v. Metzgar, 1 Rawle 227 (1829) ***(refd)***
Paragon Finance plc v. DB Thakerar & Co [1999] 1 All ER 400 ***(refd)***
Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(dist)***
Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal [2009] 2 CLJ 363 CA ***(refd)***
Twinsectra Ltd v. Yardley And Others [2002] 2 All ER 377 ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
UMW Industries (1985) Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***
United General Insurance Co Sdn Bhd v. Progress Credit Sdn Bhd [1988] 1 LNS 8 SC ***(refd)***
Watt v. Thomas [1947] AC 484 ***(refd)***
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Courts of Judicature Act 1964, s. 78(1)

For the appellant - Saiful Azian Mokhtar; M/s Jayasuriya Kah & Co
For the respondent - Douglas Lind & Delonia Chong; M/s Lind Willie Wong & Chin

[Editor's note: For the Court of Appeal judgment, please see Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd [2019] 3 CLJ 513 (overruled).]

Reported by S Barathi

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] The primary issue that arises in this appeal is whether:

(i) an absolute assignee under a letter/contract of assignment executed earlier in time; or

(ii) a creditor entitled to payment in respect of goods sold and delivered

is entitled to monies in a bank account in the name of their common debtor. The appellant, Sabah Development Bank Berhad ('the bank') is the absolute assignee of all proceeds of monies in the bank account of one Swakaya Sdn Bhd ('Swakaya') by reason of a sum of RM85 million loaned to Swakaya, while the respondent, Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd) ('Petron') is the creditor, by reason of goods sold and delivered on behalf of Swakaya to Sabah Electricity Board.

[2] In the courts below, it was determined that it was the respondent, Petron that was entitled to the proceeds. This conclusion was premised on the grounds that a constructive trust could be inferred over the subject monies/proceeds deposited by another entity, namely the Sabah Electricity Board ('SESB') into Swakaya's bank account, as payment to Petron for goods sold and delivered. In other words, the constructive trust inferred took priority over the absolute assignment created by the bank earlier in time. The appeal turns on whether this conclusion is correct or flawed.

The Parties In The High Court Suit

[3] Petron is a company engaged in the business of marketing petroleum and petroleum products. It was the plaintiff in the High Court and is the respondent before us.

[4] The first defendant in the High Court proceedings was Swakaya, the debtor, that borrowed monies from the bank and induced Petron to supply goods to SESB. Swakaya is not a party in the appeal before us. However, the actions of Swakaya have far-reaching implications for the other actors in the events which transpired.

[5] The bank was the second defendant in the High Court proceedings and is the appellant before us.

The Salient Facts

The Initial Arrangement Between SESB, Swakaya And Petron

[6] On 19 December 2012, SESB awarded Swakaya a contract to supply and deliver diesel fuel to SESB's power stations ('the SESB Contract'). The contract sum was five hundred and six million, nine hundred and fifty two thousand, eight hundred and eighty eight ringgit and seventy-five sen (RM506,952,888.75).

[7] In order to finance and carry out the SESB Contract, Swakaya applied for and was granted two banking facilities by the bank totalling eighty-five million ringgit (RM85 million). *Vide* the first letter of offer dated 12 March 2013, Swakaya was granted an initial facility of RM50 million on specific terms and conditions. The second letter of offer dated 1 August 2013 for an additional sum of thirty-five million ringgit (RM35 million) was granted on terms as set out in the second letter. Swakaya needed this funding to purchase diesel fuel from various suppliers, including Petron.

[8] As security for the initial RM50 million banking facility granted by the bank, Swakaya executed an assignment of contract proceeds agreement dated 3 April 2013. Pursuant to this agreement, Swakaya assigned absolutely to the bank all the contract proceeds from the SESB Contract.

[9] Written notice of assignment was given by Swakaya to SESB in writing on 20 March 2013. Swakaya irrevocably instructed SESB to remit all contract proceeds arising from the SESB Contract to a project account

with Malayan Banking Berhad, Kota Kinabalu ('first project account'). It was expressly specified that the assignment was given as security for the credit facilities granted to Swakaya by the bank.

[10] SESB replied on 22 March 2013 acknowledging receipt of the notice of assignment and agreeing to the same. It further agreed to comply with the instructions on the remittance of funds. In other words, SESB agreed to make all payments to the first project account in accordance with the terms of the assignment agreement between the bank and Swakaya.

[11] Security for the repayment of the additional RM35 million afforded to Swakaya, came in the form of a supplemental assignment of contract proceeds agreement dated 23 August 2013 in favour of the bank. This amounted to a second absolute assignment of all contract proceeds, (ie, payments from SESB) to the bank. It reiterated the arrangement between the three parties whereby SESB, the party paying the funds would remit the same directly to the first project account, where the assignee, the bank could draw directly from that account towards repayment of monies owed to it by the assignor, Swakaya.

[12] In summary therefore, as security for the abovementioned facilities, Swakaya absolutely assigned the full contract sum of the SESB Contract (RM506,952,888.75) to the bank. Swakaya agreed that the bank could use the proceeds deposited into the first project account towards payment of the outstanding credit facilities.

[13] One of the terms of the contract for the supply of diesel oil between Swakaya and SESB was that Swakaya could not assign the contract or the contract benefits to any other party without the prior written consent of SESB (see cl. 11.1 of the general conditions of the SESB Contract). This clause was expressed to not affect any right of Swakaya to assign absolutely, or by way of charge any money due or to become due to it, or which may be payable to Swakaya under the contract. This enabled Swakaya to absolutely assign payments received, to the bank to repay the facilities it had procured.

[14] To this end, it is pertinent that the bank's managers and officer were appointed the authorised signatories of the designated first project account, even though the said project account was under Swakaya's name.

[15] On 1 April 2013, Swakaya entered into a contract with its suppliers, one of which was Petron. Pursuant to this contract, Petron would provide diesel fuel for a period of two years for Swakaya to enable it to fulfil its contract with SESB.

[16] Petron was to be paid out of the first project account.

[17] The arrangement between Swakaya, Petron and SESB commenced in April 2013 and went smoothly at first. However, problems arose due to Swakaya's financial problems, and the arrangement had to be varied.

Swakaya's Financial Problems

[18] In October 2013, the first project account was frozen by the Malaysian Anti-Corruption Commission ('MACC') under the Anti-Money Laundering Act ('AMLA') 2001. Swakaya was denied access to the funds in the said account and was accordingly unable to use the funds in that account to purchase diesel fuel to fulfil its legal obligations under the SESB Contract.

[19] To address its inability to now pay for fuel it was required to supply to SESB under the SESB Contract, Swakaya requested Petron to supply diesel fuel to SESB directly. In return, Swakaya agreed that SESB could pay Petron directly. *Vide* a letter dated 24 October 2013, Swakaya informed SESB of the new arrangement. Swakaya and Petron confirmed this arrangement by a letter dated 15 November 2013. This letter was signed by Swakaya and Petron, but not by SESB.

[20] This 'new arrangement' was organised by Swakaya notwithstanding its express knowledge and execution of the absolute assignments it had effected in favour of the bank. The terms of the assignment agreements were such that all monies paid by SESB, including the monies paid into the second project account were assigned to the bank for the repayment of credit facilities. Any payment directly to a supplier, such as Petron, would contravene the terms of the absolute assignment agreements between the bank and Swakaya.

[21] As the bank was also unable to withdraw monies (owed to it) from the first project account, Swakaya agreed to open a second project account, this time with CIMB Bank Berhad ('the second project account'). The second project account was opened in November 2013.

[22] Similarly, it was requested that all contract proceeds from the SESB Contract be remitted to the second project account. The bank *vide* letter dated 20 November 2013 informed SESB of the new project account at CIMB bank, ie, the existence of the second project account. The bank requested that all contract proceeds from the SESB Contract be remitted to the second project account. This was entirely in accordance with the assignments made in favour of the bank by the debtor, Swakaya as security for the credit facilities afforded by the bank.

[23] On 18 February 2014 Petron wrote to SESB and copied the letter to the bank, seeking that Swakaya and the bank remit monies for diesel oil supplied to Petron.

[24] By a second notice (undated) issued by Swakaya to SESB, Swakaya notified SESB of the assignment of all contract proceeds in favour of the bank, and irrevocably instructed SESB to remit all contract proceeds from the SESB Contract to the second project account. This was acknowledged by SESB on 28 February 2014. Again, it was expressly reiterated that the assignment was security for the credit facilities afforded to Swakaya.

[25] In the month of November 2013, Petron had supplied diesel fuel to SESB directly, for which full payment of RM12,977,480.11 was remitted to Petron from the second project account. Later, the bank explained to the court that the remittance for the supplies in November 2013 were made by Swakaya to Petron without the bank's knowledge, as this occurred before the assignment of the CIMB project account to the bank was complete, and prior to the appointment of the bank's employees as signatories to the second project account. It is not in dispute that the manager and officer of the bank were only appointed as authorised signatories for the second project account in March 2014.

[26] In other words, during the period between the freezing of the first project account and prior to the setting up of the second project account, monies were paid out to Petron directly instead of the bank.

[27] The value of the diesel fuel supplied under the 'new arrangement' between Swakaya and Petron amounted to RM50,094,713.79. Petron was paid a portion of that sum, namely RM26,027,121.95 directly. The sum of RM24,835,281.62 being the balance sum claimed by Petron remained outstanding. This was because after receiving the letter dated 20 November 2013, no direct payment was made to Petron from the second project account, as had been held out by Swakaya to Petron under the 'new arrangement'. Instead, SESB followed the bank's instructions in the letter dated 20 November 2013 and deposited payment into the second project account.

[28] Petron sued Swakaya to recover the balance sum. It also sued the bank for allegedly 'wrongfully' withdrawing the balance sum from the second project account to settle part of the loans taken by Swakaya from the bank.

The Decision Of The High Court

[29] In the High Court, Petron as plaintiff brought a claim against Swakaya for the outstanding sum of RM24,835,281.62 due and owing to it for the supply of diesel oil at Swakaya's behest to SESB. Its claim against the bank is premised on the basis that the bank holds the monies paid by SESB in its favour as 'trustee' or 'constructive trustee' and is liable to Petron for the same.

[30] The learned Judicial Commissioner ('JC') allowed Petron's claim against the defendants and ordered the bank to return the monies received by the bank on the grounds of the subsistence of a trust or constructive trust in favour of Petron. In brief, the trial judge accepted Petron's contentions that by withdrawing the sum of RM24,835,281.62, the bank had unjustly enriched itself to offset the amount owed by Swakaya. In addition, the learned JC found that there was a constructive trust over the monies since the bank knew that the monies were supposed to be remitted to Petron.

[31] The bank appealed against this decision to the Court of Appeal. Swakaya did not.

The Decision Of The Court Of Appeal

[32] The Court of Appeal affirmed the decision of the High Court and dismissed the bank's appeal with costs. It took the view that the issue was not whether SESB had agreed to pay Petron directly for the diesel fuel supplied, but whether it was conscionable for the bank to claim the monies as its own and to use it for its own benefit, when SESB's payment into the second project account was meant for payment to Petron.

[33] The crux of the decision of the Court of Appeal was that the sum of RM24,835,281.62 was meant as payment for Petron's sale of diesel fuel to SESB. It was never meant as repayment of Swakaya's loan taken from the bank. There was no evidence that Petron consented to the money being utilised to reduce Swakaya's loan. Hence the court held that the bank could not unjustly enrich itself by utilising the monies for its own benefit.

Leave To Appeal To The Federal Court

[34] Dissatisfied with the decision of the Court of Appeal, the bank applied for leave to appeal to the Federal Court. Leave to appeal against the decision of the Court of Appeal was obtained on 12 April 2018 on the following question of law:

> Whether the proprietary rights and interest of an assignee of a chose in action under a legal and absolute assignment could be defeated by a claim premised on "trust" and / or "constructive trust" by a third party who claimed to have a beneficial interest over the same chose in action.

[35] We heard the appeal on 25 June 2019 and reserved our decision. We now deliver our decision and reasoning below.

Our Decision

[36] As stated at the outset, the primary issue for determination here is which of the two creditors who claim competing entitlement, should prevail:

(i) The bank in whose favour Swakaya created an absolute assignment earlier in time over the proceeds of sales of the SESB Contract (between SESB and Swakaya for the supply of diesel oil); or

(ii) Petron, who asserts a right to those proceeds in respect of a debt owed to it by Swakaya for diesel oil supplied directly to SESB pursuant to its arrangement with Swakaya *vide* letter dated 15 November 2013?

[37] It is first necessary to examine and comprehend the legal reasoning and application of the law by the Court of Appeal (and thereby the High Court) to ascertain whether their decisions are correct or erroneous in any respect.

[38] It is trite that an appellate court will not, generally speaking, intervene unless the lower court is shown to be plainly wrong in arriving at its judicial decision. (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor*

A [2010] 9 CLJ 785; *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441; *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484 and the recent English Supreme Court case of *Henderson v. Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, [2014] UKSC 41, 2014 GWD 23-437, 2014 SLT 775, [2014]
B WLR(D) 290, 2014 SCLR 692, UKSC 2013/0083.)

The Legal Rationale Of The High Court

[39] The trial judge relied on *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 ('*Takako Sakao*') as well as *Paragon Finance*
C *plc v. DB Thakerar & Co* [1999] 1 All ER 400 ('*Paragon Finance*') to conclude that the fact pattern of the instant appeal "falls squarely" within the parameters of a constructive trust. His Lordship did not explain precisely where or how such similarity arose. He held simply that he agreed with Petron that "in the circumstances of the case" the bank had received the sum claimed from SESB as a constructive trustee for the benefit of Petron.
D Accordingly it was the duty of the bank to return the monies to Petron and not keep it for itself. The trial judge went on to conclude that if the bank did not do so, it would be unjustly enriched. Accordingly it was a fit case for the court to impose a constructive trust seemingly "to satisfy the demands of justice and good conscience". Reference was made to several other cases
E which simply set out correctly the definition of a constructive trust.

[40] With the greatest of respect, the judgment of the High Court, which comprises largely of citations for the definition of constructive trusts, does not in any part of the judgment:

F (a) analyse the chronology of facts;

(b) acknowledge or examine the existence of an absolute assignment in favour of the bank;

(c) consider the effect of such an absolute assignment in relation to Petron's claim;

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(d) explain or analyse how a constructive trust arises in the context of the facts here, given the existence of extensive borrowings from the bank by Swakaya which was secured by contracts of assignment of proceeds arising/accruing from the sale of diesel fuel to SESB;

H (e) explain how the legal concepts of a constructive trust arise in the context of the various cases cited;

(f) consider whether, if such trust does indeed arise or subsist, the interplay in law between such a trust and a valid absolute assignment;

I (g) consider or apply the principles of unjust enrichment within a legal context or the factual background of this case, particularly the existence of a valid, legal, enforceable absolute assignment of the subject proceeds;

(h) consider the far reaching effects on the banking and construction industries of holding that a constructive trust can arise and defeat an absolute assignment of proceeds created prior to the subsistence of such a trust.

[41] Without the application of accepted legal principles in relation to the law relating to absolute assignments, which comprise a fundamental aspect of banking law, and on which subject there is considerable case law, the judgment cannot, with great respect, be said to be sound. Apart from the absence of accepted basic legal principles, there is a dearth of legal reasoning, which is a fundamental requirement of any judgment of the court. It does not shed light on how the court reached the conclusion, on the facts of this case, that a constructive trust arises.

[42] It is important that judgments, at first instance or otherwise, explain fully the basis for reaching a conclusion both on the facts and the law. This requires the setting out of the salient facts, an appreciation of those facts, a consideration of the relevant law in respect of the case and the application of the law to those facts resulting in a decision that is reasoned. The fact that there has been an error in the comprehension of the facts, law or applicability of a legal principle may result in a decision that is erroneous, but it would still be a legally reasoned judgment in that the method of thought and argument utilised by the judge when applying legal principles to interactions between persons or entities would be apparent.

[43] In the instant case the legal methodology utilised by the trial judge is stated to be premised on precedent and analogy but the basis on which precedent and analogy have been applied in the cases cited to the particular facts of the case before him, is absent. The similarity of the factual pattern or legal precedent, which comprises the basis to apply this form of legal reasoning, ie, precedent and analogy is not articulated.

[44] The case of *Tudingan Timur Sdn Bhd v. Che Mat bin Padali* (unreported) is entirely inapplicable on the facts and the law as it involved monies deposited with a third party in the context of a joint venture. The monies were returned and an employee of one of the joint venture companies placed the said monies in his personal bank account. The employee claimed to have passed the monies on to one of the directors of the company. The Court of Appeal found him liable to make good the monies when the plaintiff who was the other partner in the joint venture company sought the return of the monies. It was observed that the employee had "received the sum … as a constructive trustee for the benefit of the plaintiff". This last sentence appears to be the basis on which a constructive trust was found and applied to the facts of the instant appeal.

[45] In similar vein the facts of *Takako Sakao* are simply not comparable, let alone on all fours with the facts of the instant appeal. The application of the principles of law relating to a constructive trust are simply inapplicable in the context of the instant appeal.

[46] The decision of the High Court is flawed.

The Decision Of The Court Of Appeal

[47] The Court of Appeal treated the appeal as one concerning the creation of a constructive trust. The facts of the case were therefore apprehended and dealt with on that basis, namely whether or not the trial judge was correct in his conclusion that the facts of the case warranted the imposition of a constructive trust.

[48] The full factual matrix was set out as were the contentions of respective counsel. The primary complaint of the bank was that the trial judge had failed to consider the legal effect or the consequences of the subsistence of the Assignment of Contract Proceeds agreement between the bank and Swakaya.

[49] More particularly, emphasis was placed on the evidence at the trial which disclosed that SESB had not expressly agreed to make direct payments to Petron. The Court of Appeal held that this issue was not of paramount importance. What was important was "whether it was conscionable for SDBB to claim the money as its own and to use it for its own benefit when it was meant as payment to Petron for the diesel fuel that it supplied and delivered to SESB."
(SDBB refers to the bank)

[50] It is apparent from the foregoing that the Court of Appeal viewed the monies in the second project account as being available for the imposition of a constructive trust in favour of Petron's claim. Emphasis was given to the element of "conscionability" in relation to those funds, on the grounds that the court viewed the monies paid by SESB as having been meant for payment to Petron. Thereafter the sole issue before the court became one of whether or not this was a fit and proper case for the establishment of a constructive trust.

[51] To this end case law in Malaysia, the United Kingdom and the United States of America was considered and applied. In short the Court of Appeal concurred with the trial judge that the balance sum paid by SESB was held by the bank as constructive trustee for the benefit of Petron. Accordingly it was the bank's duty to return the monies to "its rightful owner", Petron.

[52] In rejecting the submissions of the bank that it was entitled to the monies by reason of the Assignment of Contract Proceeds agreement entered into with it, as security for the credit facilities afforded to Swakaya, the Court of Appeal held that this argument was "structurally flawed" as it ignored the "simple truth" that the balance sum was meant as payment for Petron's sale of the diesel fuel to SESB and was never meant as repayment for Swakaya's loan with SSDB or any other purpose.

[53] Further, the court found that there was no evidence that Petron had consented to the monies being utilized for reducing Swakaya's loan totaling RM85 million. It was concluded that it was wrong to say that Petron had lost its right to the monies merely because Swakaya had assigned the contract proceeds absolutely to SESB. The court went further to state that the Bank had behaved unconscionably in insisting that it was entitled to the said monies "despite knowing that Petron was the beneficial owner". This in turn was because the court found that the second project account was for the purposes of making payment to Petron for the diesel supplied and delivered to SESB. Therefore Petron it concluded, had "better rights over the money" as it was specifically for the purposes of payment to Petron.

[54] With the greatest of respect the Court of Appeal erred in its findings and conclusions for the following reasons:

(a) It failed to comprehend the effect of the contract for the assignment of all contract proceeds of the SESB Contract with Swakaya;

(b) It failed to comprehend the purpose and effect of an absolute assignment at law;

(c) It failed to appreciate that the absolute assignment accorded the bank entitlement to, and priority over all contract proceeds, whether housed in the first or second finance project account on the basis of the contract for the assignment of proceeds;

(d) It failed to comprehend and therefore did not consider the effect of such a finding on the banking industry;

(e) It erroneously concluded that the second project finance account was for the purposes of enabling Petron to be paid out of that account, without realising that the primary purpose of the project accounts was to separate and house the contract proceeds of the SESB Contract for the purposes of repaying the loan afforded by the bank;

(f) It failed to appreciate that at all material times the assignment continued to subsist and was valid and enforceable as security for the loan afforded by the bank;

(g) It erred in finding that this was an appropriate case for the imposition of a constructive trust in that the bank had never at any point of time displayed deceptive conduct or dishonesty, nor taken monies not lawfully owing to it;

(h) It erred in finding that the monies in the second finance project were "meant as payment to Petron" for diesel fuel that it supplied and delivered to SESB. Accordingly the factual and legal basis for finding a constructive trust never subsisted;

(i) It failed to appreciate that in *Takako Sakao*'s case the circumstances were such that it was unconscionable for the owner of the property to assert his beneficial interest and deny the beneficial interest of another. In the

instant case the bank was lawfully asserting its prior legal right and entitlement to the monies in the second project account by way of priority and security, thus precluding the imposition of a constructive trust.

The Effect Of The Absolute Assignment Given By Swakaya To The Bank

The Clauses In The Contracts Between Swakaya And The Bank

[55] It will be recalled that Swakaya provided security for the credit facilities of RM85 million it procured from the bank. This took the form of the assignment of all proceeds received by Swakaya from the SESB Contract. The provisions of the Assignment of Contract Proceeds agreement dated 3 April 2013 expressly stipulates in section 3.1 that:

> … the Assignor as beneficial owner HEREBY ASSIGNS absolutely to the Assignee all of the Contract Sum to which the Assignor is or may be entitled …

[56] A similar provision is found in the Supplemental Assignment of Contract Proceeds dated 23 August 2013. This is not in dispute.

Section 4(3) Of The Civil Law Act 1956

[57] The absolute assignments thus created are legally valid as the requisite written notices of assignment were served on SESB. Section 4(3) of the Civil Law Act 1956 provides:

> (3) **Any absolute assignment**, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, **shall be**, and be deemed to have been, **effectual in law**, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, **to pass and transfer the legal right to the debt or chose in action, from the date of the notice**, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. (emphasis added).

Definitions

[58] "Assignment" generally means the transfer of existing proprietary rights, future rights, property, debt or other contractual rights by one person to another person. In the instant appeal it refers to the transfer of rights or entitlement to the contract proceeds received by the debtor, Swakaya to the bank.

[59] "Assignee" is the new creditor, a lender or a buyer of receivables, transferee or holder of the security. In the instant appeal, it refers to the bank.

[60] "Assignor" is the creditor in the original contract giving rise to the assigned receivables. The assignor is either a borrower (or a third party) who transfers or creates security over a receivable. Here it is Swakaya.

[61] "Chose in action" is the real and personal right of property which can only be claimed or enforced by action, and not by the taking of physical possession, because it is not tangible.

[62] "Obligor" is the debtor in the original contract from which the assigned receivables arise, the person who owes payment of the receivable to the assignor. Here it is SESB who makes payment to Swakaya for diesel oil supplied under the SESB Contract.

The Effect Of An Absolute Assignment

[63] The effect of an absolute assignment has been considered in numerous cases. In *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 CLJ 1 the Federal Court explained in full how s. 4(3) was to be construed, as well its effect and consequences.

[64] The definition to be accorded to a 'chose in action' as explained in *Mozley & Whiteley's Law Dictionary* (10th edn) was utilised. It is defined as "a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action". It is therefore clear that the monies which Swakaya was entitled to receive from SESB under the SESB Contract for the supply of diesel oil amounts to a 'chose in action'. It is indeed something to which the bank, as assignee had no present right of enjoyment, but by reason of the assignment was entitled to a right to recover those monies by action.

Were The Assignments Accorded By Swakaya Absolute Assignments Or By Way Of Charge Or Security Only?

[65] The next issue considered was whether the contract of assignment did indeed absolutely assign such a chose in action or merely secured it.

[66] Whether or not an assignment is absolute for the purposes of the statutory regime is ultimately an issue of construction. (see *Mercantile Bank of London Ltd v. Evans* [1899] 2 QB 613).

[67] The case of *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41; [1989] 2 MLJ 149, SC is authority for the proposition that the use of the words "absolutely assigns" demonstrates that the instrument was intended by the parties to be an absolute assignment and not one by way of charge only.

[68] The bank here holds an absolute assignment, consistent with the use of the words "assigns absolutely" as employed in section 3.1 of the contract for the assignment of proceeds (see also *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* (*supra*); *United General Insurance Co Sdn Bhd v. Progress Credit Sdn Bhd* [1988] 1 LNS 8; *Chung Khiaw Bank Ltd v. Hipparion (M) Sdn*

Bhd [1988] 1 CLJ 164; [1988] 1 CLJ (Rep) 480; *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 AMR 2081 FC).

[69] It is apparent from the use of the words "assigns absolutely" in the clauses specified in the contract for the assignment of proceeds in the instant case, that the assignment of the chose in action, ie, the right to the proceeds paid into the project accounts, is an absolute assignment and not by way of charge only.

[70] In other words the legal entitlement to the contract proceeds, as and when they are deposited in the project accounts (*albeit* the first or second project account) is that of the bank and not Swakaya or any other third party. The effect and consequence of the absolute assignment is therefore that ownership or entitlement to recover and receive the proceeds paid in by SESB was transferred from Swakaya to the bank as early as 3 April 2013.

[71] It is evident from the statute itself that the effect of an assignment of a 'chose in action' (ie, the monies paid by SESB to Swakaya under the SESB Contract for the supply of diesel oil from Swakaya to the bank), is to pass and transfer the legal right to that chose in action to the bank, as assignee, from the date of notice being accorded to the obligator, ie, SESB. This means that as of 3 April 2013, the bank enjoyed legal title to the monies in the project account. That is the effect of the absolute assignment (see also *Affin Bank Berhad v. ACP Industries Berhad* [2013] 1 LNS 388; [2014] 1 MLRA 182).

Conditions For The Subsistence Of A Valid Absolute Assignment

[72] The case of *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379, a decision of this court, sets out the conditions necessary for effecting an absolute legal assignment under s. 4(3) of the Civil Law Act 1956. The conditions are:

(a) The "debt or other chose in action" must be one that is existing;

(b) The assignment must be in writing under the hand of the assignor;

(c) The assignment must be absolute and not by way of charge only; and

(d) There must be express written notice of the assignment to the obligor

[73] The conditions specified above are met in the instant case because the debt or other chose in action was subsisting, namely a right (on the part of the bank) to receive, own or recover the contract proceeds under the SESB Contract. At the time of the assignment by Swakaya to the bank (3 April 2013), such a debt or right to the debt subsisted as the SESB Contract had been executed between Swakaya and SESB (19 December 2012).

[74] As stated earlier the subject matter of the assignment was a chose in action namely the right to receipt of, and recovery (if withheld) of the contract proceeds of the SESB Contract.[1]

[75] The assignment was in writing, assigned absolutely the proceeds of the SESB Contract directly to the bank and notice of such assignment was properly given to SESB.

[76] It is therefore our conclusion that, after construing the relevant contracts of assignment as a whole, Swakaya had created, in favour of the Bank, an absolute assignment not purporting to be by way of charge only, within the meaning of s. 4(3) of the Civil Law Act 1956. The assignment dated 3 April 2013 and 23 August 2013 was absolute as Swakaya (assignor) intended to transfer its legal rights and beneficial interest over the SESB Contract proceeds irrevocably to the bank (assignee). The assignment was unconditional and did not introduce uncertainty to the obligor, as SESB had been given express notice to make payment to the bank.

[77] From the contemporaneous documents in the appeal records, express notices of assignment of the contract proceeds had been given by Swakaya (assignor) and the bank (assignee) to SESB (obligor) on 20 March 2013, 20 November 2013 and February 2014. By these notices SESB was notified that Swakaya had obtained loan facilities from the bank and requested that all contract proceeds due under the contract be assigned and remitted directly into initially the first project account, later the second project account for the bank.

[78] SESB's responses in writing dated 22 March 2013 and 28 February 2014 (for the second project finance account) proved that it expressly consented to the assignment in writing.

[79] The effect of such consent is comprehensively set out in the old case of *Metzgar ex rel. Uhler v. Metzgar, 1 Rawle* 227 (1829) from the United States of America, where Gibson, CJ agreed that "notice puts an end to all privity between the assignor and obligor, and the assignee becomes the owner of the bond, subject to any existing equity against the obligee. After the notice of the assignment, a new contract arises between the obligor and the assignee, who holds a chose in action no more negotiable than it was in the hands of the obligee."

[80] For these reasons the assignment of the contract proceeds under the SESB Contract to the bank is clear beyond dispute. The effect was to transfer ownership of all future funds deposited in the designated accounts to the bank. As the monies were periodically deposited ownership of the funds was with the bank, over and above other interests, including that of Petron, unless a prior equity subsisted, which is not the case here.

Did The Freezing Of The First Project Account And The Creation Of The Second Project Account Affect Or Alter The Validity Of The Absolute Assignment Such That Petron Acquired Any Greater Entitlement Than The Bank To The Contract Proceeds Of The SESB Contract?

[81] The general rule is that an assignment shall be valid and remain in force until and unless the indebtedness is settled in full, or such assignment is terminated by the bank. It will be recalled that new arrangements arose by reason of the freezing of the first project account (with Maybank) by MACC. *Vide* the new arrangements all contract proceeds from the SESB Contract were to be remitted into the second project account (the CIMB account). Swakaya entered into a new agreement with Petron on 15 November 2013 for the direct supply and delivery of the diesel fuel. However neither SESB nor the bank were privy to this arrangement.

[82] Petron's contention is that it enjoyed ownership over the SESB contract proceeds paid into the second project account by reason of the agreement between Swakaya and Petron on 15 November 2013. It may well be the case that Swakaya held out to Petron or intended that the proceeds were to be utilised for the supply of petrol. But legally this is entirely inconsequential, given the existence of the absolute assignment which had transferred ownership of those contract proceeds in favour of the bank with effect from 3 April 2013.

[83] In short, Swakaya could not renege from, nor change its position because the right to those contract proceeds had been transferred completely to the bank as of 3 April 2013.

[84] The change as to where the monies were deposited did not, and could not, affect the bank's rights under the valid absolute assignment. A mere change of bank accounts did not, and could not, affect the absolute assignment which had been effected much earlier. The existing rights of the bank were therefore in no way affected. The bank's right to the contract proceeds remained intact notwithstanding the freezing of the first project account and the opening of the second project account.

[85] In point of fact, since Swakaya had lost its rights and interest to the contract proceeds, it could not then resile from the absolute assignment by entering into a new agreement with Petron. This was contrary to and contravened the terms of the Assignment of Contract Proceeds agreement it had executed with the bank. More importantly it did not have the effect of diverting funds to Petron because Swakaya had no legal entitlement to those contract proceeds.

[86] Swakaya also had no right to make any payment (the payment of RM26,027,121.95) to Petron from the second project account without the consent of the Bank, which was legally entitled to the SESB contract proceeds. To approve or concede to such a preference in favour of Petron flouts established principles.

[87] As such, there was no basis for the trial judge to effectively "extinguish" the rights of the bank as the lawful assignee under the absolute assignment and impose a constructive trust in favour of Petron for the sum of RM24,835,281.62 (part of the contract proceeds) sitting in the second project account simply by virtue of the new agreement between Petron and Swakaya dated November 2013, when the absolute assignment in favour of the bank was valid, subsisting and had the effect of assigning entitlement to the entirety of the contract proceeds in favour of the bank.

[88] We now move to consider the application of constructive trusts in a commercial arrangement such as the present, and whether such imposition is tenable in light of the existence of a legally valid and subsisting absolute assignment. This in turn warrants a consideration of the law relating to the subject.

The Law Relating To Constructive Trusts

How Does A Constructive Trust Arise?

[89] The leading case authorities of *Takako Sakao* (which adopted the test in the *Paragon Finance*) and *Carl Zeiss Stiftung v. Herbert Smith & Co* [1969] 2 Ch 276, 300) and *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal* [2009] 2 CLJ 363 (which relied on, among others, the cases of *Hussey v. Palmer* [1972] 3 All ER 744 and *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669) have established that a constructive trust arises by operation of law when the circumstances are such that it would be unconscionable for the owner of the property in dispute to assert his own beneficial interest in the property and deny the beneficial interest of another. As comprehensively expressed in these cases, constructive trust is a remedial device that is imposed by equity to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties.

[90] And in *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* [2016] 2 CLJ 7171 this court reiterated the statements above before going on to adopt the approach in *Twinsectra Ltd v. Yardley And Others* [2002] 2 All ER 377. This saw the imposition of a two-fold test comprising both an objective and a subjective test. This test which requires compliance with the additional subjective honesty ingredient, was approved by this court in *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1.

[91] Applied in the context of the present case, the imposition of a constructive trust could only arise by operation of law where the circumstances are such that it would be unconscionable for the bank to continue to assert a right to the contract proceeds under the SESB Contract so as to deny a subsisting interest of Petron. Several issues immediately arise:

(a) Given That The Bank Enjoys A Legal And Valid Subsisting Absolute Assignment Over Those Contract Proceeds Can It Be Said That It Is Unconscionable For The Bank To Assert A Right To The Same, Whether Housed In Project Finance Account One Or Two?

[92] The answer must be that it is not and cannot be unconscionable for the bank to rightfully seek to recover the monies in the second project finance account because entitlement to those monies (ie, the chose in action) was transferred to the bank as of 3 April 2013. The fact that Petron had entered into a new contract with Swakaya in November 2013 makes no difference whatsoever as we have explored in some detail earlier. The issue of "unconscionability" simply does not arise in the face of clear legal rights created under established principles which comprise the cornerstone of banking law.

[93] If a constructive trust were to applied in such circumstances, all security given by a borrower to a banking institution would be rendered nugatory or at the very least put in jeopardy by the possibility of a finding of a constructive trust by a third party claiming the same funds which comprise security for a loan. It would cast considerable uncertainty on the law of banking.

(b) Where Is The Evidence Of Dishonest Conduct Or Dishonesty On The Part Of The Bank Which Is The Hallmark And Basis For The Imposition Of A Constructive Trust?

[94] Again the answer must be that there is simply no such evidence. Dishonesty or less than honourable conduct, such as it is, can be attributed only to Swakaya. It was Swakaya that entered into a contract with Petron, inducing it to continue to supply diesel oil *vide* the new contract, without disclosing that the contract proceeds in the second project finance had already been absolutely assigned to the bank for the credit facilities it had been afforded. The bank was never made aware of this arrangement at the material time. Neither did SESB concur with any such arrangement, knowing that it would run foul of the absolute assignment which it had expressly consented to.

[95] It therefore bears repeating that there is simply no basis for the imposition of a constructive trust in the circumstances of this case.

[96] The facts of the instant appeal bear no relation to *Takako Sakao* where there was a dishonest appropriation of the innocent party's beneficial interest in the property which the wrongdoer sought to dishonestly appropriate the entirety of the property without acknowledging the innocent party's interest. At the risk of repetition, the bank here was never, nor is now seeking to appropriate Petron's "interest" in the contract proceeds. This is because Petron has no "interest", legal or beneficial in the proceeds. This in turn is by reason of the absolute assignment created prior in time (3 April 2013) whereby there was a transfer of the entitlement to proceeds deposited by SESB under the SESB Contract, in favour of the bank.

[97] Petron's recourse is against Swakaya directly as it entered solely into a contract with Swakaya. Petron did not enter into any arrangement with the bank whereby the bank consented to Petron being paid out of the contract proceeds. As for SESB, even if it had knowledge of this new arrangement between Swakaya and Petron, it had no bearing whatsoever on the absolute assignment, by which SESB was bound to deposit contract proceeds into a project account (either 1 or 2) in favour of the bank.

[98] The contract between Swakaya and Petron does not create an equity giving Petron any interest in the contract proceeds. This is because Swakaya has no entitlement or right to create any such interest by reason of the absolute assignment in favour of the bank. Further, the contract between Swakaya and Petron merely creates, at best, a debt due and owing by Swakaya to Petron when it fails to pay for the diesel petrol supplies.

[99] There is therefore no basis for the imposition of a constructive trust. Petron can lay no claim to the subject matter of the alleged trust ie, the contract proceeds because it has simply no interest, legal or beneficial in the same.

[100] It is also clear that a fundamental 'certainty' namely the subject matter of a trust is missing. There is no element of dishonesty, but on the contrary an absolute legal entitlement to the monies *vis a vis* the bank. There is therefore no basis for invoking the common law doctrine of a constructive trust.

[101] A perusal of the nature of a constructive trust in *Halsbury's Laws of England* (4th edn) (which was relied upon by the Court of Appeal) bears out our conclusion that there is no basis for a constructive trust to arise. It is said to "arise by operation of law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealing with that fiduciary property that he acquired the specific property subject to the constructive trust."

[102] As has been explained above, it would be completely contrary to the doctrine of constructive trust under the common law, as well as established principles of written law to conclude that the bank held the balance sum as a trustee in favour of Petron. How can it be inequitable for the bank to appropriate those monies, when it is entitled to do so under the law by reason of the subsistence of a valid, enforceable and binding legal assignment?

[103] Neither can it be said that the bank holds the monies for Petron in a fiduciary capacity. There is simply no relationship between the bank and Petron that would warrant such a relationship to be imputed. There is also a requirement that the bank should have dealt with the property in such a manner so as to effectively deprive Petron of its 'interest' or 'entitlement' to a part of the property.

[104] Again, as explained immediately above, this simply does not arise as the bank is dealing entirely in accordance with an absolute assignment in relation to the contract proceeds. And Petron has no interest in those proceeds. There can therefore be no question of a constructive trust arising. To this end the decision of both the courts below is necessarily flawed.

Burden Of Proof

[105] In this claim the burden continually remained on Petron as the plaintiff to establish that it enjoyed a claim superior to that of the bank in relation to the contract proceeds under the SESB Contract, on a balance of probabilities.

[106] It is clear to us that Petron failed to discharge the burden on it, for the reasons cited above.

Entitlement To The Balance Sum

[107] Ultimately this claim centred on whether a creditor entitled to the recovery of a debt pursuant to a claim for monies for goods supplied can prevail over the holder of an absolute assignment. Petron is the creditor entitled to a debt due and owing by Swakaya to it, while the bank is the absolute assignee of the contract proceeds under the SESB Contract (comprising the subject matter of this claim) as a consequence of Swakaya assigning those proceeds to it, as security for the grant of credit facilities of RM85 million to Swakaya.

[108] There is no basis in law to support the proposition that Petron's mere claim for the recovery of a debt against Swakaya can possibly prevail against that of the bank, where the bank is the lawful assignee in law in relation to the subject matter of the suit here, namely the SESB Contract proceeds. It is clear that the bank's claim which arose prior to any claim by Petron, prevails. Petron has no equity in those SESB contract proceeds.

Conclusion

[109] To summarise, the court takes the view that:

(i) The bank obtained and therefore enjoys a valid and enforceable absolute assignment which complies with s. 4(3) of the Civil Law Act 1956;

(ii) The effect of the absolute assignment under the law is to transfer the entitlement to the monies from the SESB contract proceeds ('the chose in action') held in either project account 1 or 2, in favour of the Bank;

(iii) The bank is and was, therefore at all material times, fully entitled to utilise the SESB contract proceeds in reducing the loan sums or credit facilities afforded by it to Swakaya;

(iv) When the "new arrangement" was made *vide* a contract between Swakaya and Petron in November 2013, this had no effect on the absolute assignment created by Swakaya in favour of the bank in April

2013 in respect of the grant of the credit facilities by the bank. In other words, the bank did not at any time lose its entitlement to the SESB contract proceeds by virtue of the absolute assignment which remained, and remains valid, binding and enforceable;

(v) There is no basis whatsoever for the application of the common law doctrine of a constructive trust, nor to impose such a trust on the balance sum. Petron had no interest in the balance sum, be it legal or equitable. All Petron had was a right of recovery against Swakaya directly. The 'new arrangement' and Swakaya endorsing Petron's claim for the balance sum did not create any form of 'equity' in favour of Petron. The imposition of such a constructive trust was therefore erroneous.

Leave Question

Whether the proprietary rights and interest of an assignee of a chose in action under a legal and absolute assignment could be defeated by a claim premised on "trust" and / or "constructive trust" by a third party who claimed to have a beneficial interest over the same chose in action.

Answer To Leave Question

For these reasons, the answer to the leave question is in the negative.

[110] We are satisfied that the appeal has merits. We therefore allow the appeal, set aside the decision of the Court of Appeal and dismiss Petron's claim against the Bank with costs of RM40,000 to be paid by Petron to the bank for the present appeal and costs of RM45,000 for the proceedings in the courts below. For avoidance of doubt, we order that the costs awarded to Petron in the sum of RM30,000 in the High Court and RM15,000 in the Court of Appeal, if already paid, be refunded to the bank.

[111] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as Justice Ahmad Maarop has since retired. This is the judgment of the remaining members of the panel.

End note:

1. It is significant to note that the assignment was binding on SESB as well, in that if it made payment (after the assignment came into effect) directly to Swakaya or a third party without the consent of the bank it might well open itself to liability to repay the bank (see *Malayawata Steel Berhad v. Government of Malaysia & Anor* [1980] 1 LNS 45; [1980] 2 MLJ 103).